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No. 93-1365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE SAMMETT CORPORATION,

Petitioner,

v.

KEY ENTERPRISES OF DELAWARE, INC.,

Respondent.

On Petition for A Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

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BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE[1]

Respondent, KEY ENTERPRISES OF DELAWARE, INC., d/b/a VCA Medical Supply ("VCA"),[2] filed a Complaint on July 3, 1985, against, among others, Petitioner, The Sammett Corporation ("Sammett"), Venice Hospital, and Medicare Patient Aid Centers ("MPAC"). VCA alleged in its Complaint that the Defendants foreclosed vendors of Durable Medical Equipment ("DME"), including VCA, from competing in the DME leasing market in the Venice and Englewood, Florida area, thereby injuring VCA and substantially affecting competition in those product and geographic markets.

A jury trial on VCA's claims commenced on February 24, 1988, and concluded on March 9, 1988. The jury was presented with thirty-two (32) special verdict interrogatories, asking whether VCA proved that the Defendants had engaged in (1) an unlawful conspiracy and restraint of trade under § 1 of the Sherman Act; (2) unlawful monopolization, attempted monopolization, conspiracy to monopolize, and/or monopoly leveraging under § 2 of the Sherman Act; and/or (3) tortious interference with business relations under Florida common law.

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[1] Respondent submits this Statement of the Case in order to provide the Court with the pertinent factual background of this case and its unique procedural setting.

[2] Pursuant to Supreme Court Rule 29.1, Respondent, Key Enterprises of Delaware, Inc., discloses that it is a Florida corporation, and that it has no parent companies, subsidiaries or affiliates at the present time. Respondent respectfully refers the Court to the Petitioner's Corporate Disclosure Statement, at page ii of its Petition for Writ of Certiorari, for the corporate information relating to Petitioner and the other Appellees below.

On March 11, 1988, the jury found in favor of VCA on *each* of its claims and awarded VCA $760,983.00 in damages—the precise dollar amount requested by VCA. On March 14, 1988, judgment was entered in favor of VCA for the sum of $2,282,949.00, reflecting a trebling of the damages award, with interest and costs.

On March 28, 1988, the Defendants filed a Motion for Judgment Notwithstanding the Jury's Verdict, or Alternatively for a New Trial, or for a Remittitur. By a Memorandum Decision and Order rendered over nine months later, on January 19, 1989, the District Court granted the Defendants' Motion, entering judgment for the Defendants notwithstanding the jury's verdict on each of the six claims advanced by VCA. Pet. App. 52a-65a. VCA filed a Notice of Appeal to the U.S. Court of Appeals for the Eleventh Circuit on February 1, 1989.

In its appeal, VCA argued, among other points, that the District Court disregarded thestandard for evaluating a Motion for Judgment Notwithstanding the Jury Verdict, by selectively and qualitatively reviewing the evidence presented to the jury. VCA also argued that the District Court misapplied the antitrust laws, relying on a § 1 tying arrangement decision as dispositive of all of VCA's claims. VCA did not submit a tying claim to the jury, and the tying case relied upon by the District Court, *Bob Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033 (5th Cir.), *cert. denied*, 454 U.S. 860 (1981), has never been extended by any court to a non-tying claim brought under § 1 of the Sherman Act.

In a unanimous 3-0 decision rendered on December 28, 1990, a panel of the Eleventh Circuit reversed

the decision of the District Court and remanded with directions to reinstate the jury verdict in favor of VCA. Pet. App. 15a-51a. The Eleventh Circuit panel,[3] in a 19-page decision[4] that it based on a number of longstanding decisions rendered by this Court, found that the jury's verdict in favor of VCA was supported by "substantial evidence." The Eleventh Circuit panel thoroughly rejected the District Court's reasoning, particularly its misreliance on *Bob Maxfield*: "[T]he district court erred by applying the strict tying standard for coercion to this reciprocal dealing case." Pet. App. 34a. The panel's decision has since been cited with approval by a number of courts, including this Court.[5]

On January 17, 1991, Venice Hospital, Sammett and MPAC filed a Petition for Rehearing and Suggesting for Rehearing En Banc (the "Petition for Rehearing"). However, while the Petition for Rehearing was pending, VCA and Venice Hospital agreed upon a settlement of this case, pursuant to which Venice Hospital paid VCA $3,272,111.11. This amount represented the full amount of the treble damages awarded to VCA by the jury, plus VCA's taxable costs, including its attorneys' fees through appeal, but specifically excluding any post-judgment interest.[6]

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[3] Senior Circuit Judge Thomas A. Clark authored the opinion and was joined by Circuit Judge Phyllis A. Kravitch and Senior District Judge C. Clyde Atkins (sitting by designation).

[4] *See Key Enterprises of Delaware, Inc. v. Venice Hosp.*, 919 F.2d 1550 (11th Cir. 1990).

[5] *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. ___, 122 L. Ed. 2d 247, 255 n.5, 113 S. Ct. ___ (1993).

[6] The post-judgment interest, accruing at 6.71% per annum

VCA reserved the right to pursue the unpaid post-judgment interest and any additional taxable costs, including attorneys' fees, incurred by VCA through the duration of the appeal, against Sammett and MPAC, who did not participate in the settlement.

As part of the settlement between the parties, Venice Hospital agreed to withdraw its Petition for Rehearing still pending before the Eleventh Circuit, and to jointly move with VCA to involuntarily dismiss the balance of the Petition for Rehearing brought by Sammett and MPAC. Accordingly, on November 13, 1991, VCA and Venice Hospital filed a Joint Motion for Withdrawal of Venice Hospital's Petition and for Immediate Issuance of Mandate, together with a separate Joint Motion for Involuntary Dismissal of Sammett's and MPAC's Petition. Both of the Joint Motions asked the Eleventh Circuit to enter a judgment reinstating the jury's verdict in favor of VCA consistent with the unanimous Eleventh Circuit panel decision. Significantly, neither VCA nor Venice Hospital moved to vacate the District Court's judgment.

Sammett and MPAC opposed the Joint Motions on November 15, 1991, in part due to their concern of the potential res judicata effect that the case, as settled, might have on MPAC and Sammett in any future case that might be brought by VCA against them. As Sammett and MPAC argued at page 2 of their opposition, "nothing prevents appellant Key Enterprises from claiming that this case is res judicata against both MPAC and Sammett with regard to all

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since the date of the original judgment in March 1988, exceeded $550,000.00 by the time of the settlement between VCA and Venice Hospital.

damages that may have been incurred after the date of the jury verdict."

In an Order dated February 5, 1992, the Eleventh Circuit panel refused to dismiss the Petition for Rehearing. The panel explained that it could not "approve a settlement that requires withdrawal of a joint petition for rehearing and issuance of a mandate" when not all the parties had joined the motion.

On or about April 17, 1992, while the Petition for Rehearing remained pending before the Eleventh Circuit, VCA brought a new action ("VCA II") against Venice Hospital, Sammett and MPAC for ongoing conduct in violation of the antitrust laws. Despite the jury verdict in March 1988 and the Eleventh Circuit panel decision in December 1990 against them, *and* Venice Hospital's payment in full of the damages awarded to VCA (excluding any post-judgment interest) in November 1991, the Defendants continued to engage in many of the same anti-competitive acts that illegally channeled hospital patients to MPAC. In fact, as VCA alleged in its new Complaint, the Defendants' actions since the jury verdict in the first case had become even more pernicious, in that MPAC had substantially increased its DME prices in the market that it had monopolized, to the detriment of the consumer. MPAC's monopolistic stranglehold over the Venice DME market permitted it to maintain those higher prices—ranging from 27% to 190% higher than those offered by VCA for the same DME—without losing patient referrals from Venice Hospital, the source of most of the DME business in the Venice market.

Sammett and MPAC responded to VCA II by filing in VCA I, before the Eleventh Circuit, a Motion to Compel Dismissal or in the Alternative to Stay. Sam-

mett and MPAC argued that VCA's second Complaint, which sought damages in addition to those awarded in its first action, must be dismissed under principles of res judicata. Alternatively, Sammett and MPAC, acknowledging that res judicata requires a final judgment on the merits in a prior suit, argued that VCA II should be stayed until the Eleventh Circuit rendered a final ruling in VCA I. Sammett and MPAC contended, at page 9 of their Memorandum in Support of Motion to Compel Dismissal or in the Alternative to Stay (dated May 6, 1992), that "a judgment in favor of Petitioners in *Key I* would foreclose Respondents from pursuing their claims under *Key II*." VCA disputed this claim in its response filed on May 19, 1992, arguing at page 7 thereof that "res judicata is inapplicable here because *Key II* does not attempt to relitigate claims already tried to the jury in *Key I*, nor does it raise claims which *could* have been litigated in that prior action."

The Eleventh Circuit never ruled on the Motion to Compel Dismissal or to Stay by Sammett and MPAC. Instead, on November 10, 1992, twenty-two (22) months after the Petition for Rehearing was filed, the Eleventh Circuit decided to rehear the case en banc. Pet. App. 66a-67a. Pursuant to Eleventh Circuit Rule 35, the effect of rehearing the case en banc was to automatically vacate the panel decision and to stay the mandate thereunder.

However, on December 1, 1993, after the case was fully briefed and argued to the en banc Court, the Eleventh Circuit held that it "improvidently issued" its order taking the case en banc, because, it ruled, no case or controversy existed at the time of its order in light of the settlement between VCA and Venice

Hospital. Pet. App. 1a-14a. The Eleventh Circuit therefore vacated its order granting en banc review and returned the case to the panel "with instructions that it dismiss the appeal, vacate the district court's judgment, and remand the case to the district court with instructions to dismiss the case." Pet. App. 14a.

Sammett filed the instant Petition for Writ of Certiorari on March 1, 1994, objecting to the Eleventh Circuit's vacation of the District Court's judgment notwithstanding the jury verdict.

II. SUMMARY OF ARGUMENT

This Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and its progeny required the Eleventh Circuit to vacate the District Court's judgment in this case. This Court has consistently applied *Munsingwear* to vacate district court judgments in cases that have become moot on appeal, whether due to settlement or otherwise.

In addition, contrary to the artifice created in the Petition, the Eleventh Circuit's opinion does not conflict with rulings by other Circuit Courts of Appeals. Petitioner cites decisions by other Circuits on motions to vacate district court judgments, typically involving settlements that were conditioned on the vacation of the district court judgments at issue. This case, however, does not involve a request by any party to vacate the District Court's judgment; rather, both of the settling parties, VCA and Venice Hospital, simply moved to dismiss the Petition for Rehearing then pending before the Eleventh Circuit, and thereby uphold the well-reasoned opinion of the Eleventh Circuit panel.

III. ARGUMENT

1. This Court Has Consistently Applied *Munsingwear* To Vacate District Court Judgments In Cases Mooted On Appeal.

This Court's decision in *Munsingwear*, and its progeny, required the Eleventh Circuit to vacate the District Court's judgment based on the mootness of this case following the settlement between VCA and Venice Hospital.[7] This Court noted in *Munsingwear* that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. The *Munsingwear* Court emphasized that this was " 'the duty of the appellate court.' " *Id.* at 40 (quoting *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936)).

This Court explained its ruling in *Munsingwear* as follows:

> That procedure [of vacatur] clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is

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[7] Petitioner does not dispute in its Petition that the appeal became moot following the settlement between VCA and Venice Hospital. VCA is likewise assuming, for purposes of this Brief in Opposition, that the appeal was rendered moot by its settlement with Venice Hospital.

> prejudiced by a decision which in the statutory scheme was only preliminary. *Id.* at 40.

The basic policy advanced by this procedure is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41.

Consistent with *Munsingwear*, the Eleventh Circuit's vacation of the District Court's judgment "clears the path for future relitigation of the issues between the parties." VCA is now free to litigate VCA II against Venice Hospital, Sammett and MPAC. Were the District Court's judgment to remain intact, on the other hand, Petitioner would argue that VCA II is barred by res judicata.[8] Indeed, Petitioner previously argued this position in the Motion to Compel Dismissal or in the Alternative to Stay that it filed in the Eleventh Circuit, following the filing of VCA II. The purpose of the instant Petition, moreover, is to revive the District Court's judgment so that Petitioner may attempt to utilize it to defeat, on res judicata grounds, VCA II. Petitioner even concedes this motive in its Petition. *See* Pet. at 11 (acknowledging "the issue preclusion sought by Petitioner"). However, the *Munsingwear* doctrine would be directly contravened by such a result, for then the District Court's judgment, "unreviewable because of mootness," would "spawn" grave legal consequences to VCA and its new action.

Based on *Munsingwear*, this Court has consistently vacated district court judgments in cases that have become moot during the appeal process. For instance,

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[8] VCA would, of course, vigorously oppose any such res judicata argument by the Petitioner.

in *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979), this Court reviewed a Tenth Circuit ruling that dismissed an appeal on the ground of mootness but expressly allowed the judgment of the trial court to stand. The Court began its analysis by quoting its prior decision in *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936):

> Where it appears upon appeal that the controversy has become entirely moot, it is the *duty* of the appellate court to set aside the decree below and to remand the cause with directions to dismiss. (Emphasis supplied.) *Great Western*, 442 U.S. at 93.

The Court noted that "[t]he course of action prescribed in *Duke Power* has been followed in countless cases in this Court." *Id.* (citations omitted). Accordingly, the Court held that the Tenth Circuit's ruling that the district court judgment would remain in effect notwithstanding the mootness of the appeal thereof was "totally at odds with the holding of *Duke Power*." *Id.* The Court explained that "[t]he reasons for not allowing the District Court judgment to remain in effect when the fact of mootness had been properly called to the attention of the Court of Appeals were fully stated in [*Munsingwear*]." *Id.* at 93-94.

Petitioner seeks in this case that which was specifically rejected by the Court in *Great Western*. While Petitioner does not dispute the Eleventh Circuit's dismissal of this appeal on the ground of mootness, it urges this Court to reinstate the District Court judgment. Yet even were the Eleventh Circuit or this Court to approve of the reasoning of the District

Court in entering a judgment notwithstanding the jury verdict, that approval cannot excuse a "failure to follow the teaching of *Duke Power*." *Great Western*, 442 U.S. at 94. Consistent with *Munsingwear*, *Great Western* requires that when an appeal becomes moot, it must be dismissed *and* the district court judgment must be vacated.

This Court has previously declined to carve out any exceptions to the *Munsingwear* rule. For instance, in *New Left Educ. Project v. Board of Regents of the Univ. of Tex. Sys.*, 472 F.2d 218 (5th Cir. 1973), the Fifth Circuit sought to except from *Munsingwear* any appeals that have become moot through actions of the appellant, such as where the appellant settles the action. *Id.* at 221. The Fifth Circuit's decision to leave the district court judgment intact was summarily vacated by this Court, with instructions to dismiss the case as moot. *Board of Regents of the Univ. of Tex. Sys. v. New Left Educ. Project*, 414 U.S. 807 (1973). *Accord Security Bancorp v. Board of Governors of the Fed. Reserve Sys.*, 655 F.2d 164 (9th Cir. 1980), *vacated*, 454 U.S. 1118 (1981).

Indeed, both before and after *Munsingwear*, this Court has summarily vacated judgments in cases settled while pending on appeal. *See, e.g.*, *Hammond Clock Co. v. Schiff*, 293 U.S. 529 (1934); *Stewart v. Southern Ry. Co.*, 315 U.S. 283 (1942); *Black v. Amen*, 355 U.S. 600 (1958); *J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S. 115 (1959); *Lake Coal Co., Inc. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985); *City Gas Co. of Fla. v. Consolidated Gas Co. of Fla., Inc.*, 499 U.S. 915 (1991).[9]

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[9] Petitioner concedes that the *Munsingwear* doctrine "fre-

Notwithstanding all of the foregoing decisions by this Court that have applied the *Munsingwear* doctrine of vacatur to cases that have become moot on appeal, Petitioner argues that vacation is inappropriate here in light of the Court's decision in *Karcher v. May*, 484 U.S. 72 (1987). However, while Petitioner accurately states the facts in *Karcher*, it misapplies its holding to this case, one that involves entirely different circumstances.

Karcher involved a constitutional challenge to a New Jersey law that authorized a minute of contemplative silence in that state's public schools. The statute was defended, unsuccessfully, in the district court and court of appeals by the two presiding officers of the New Jersey Legislature, Karcher and Orechio. Subsequently, the two officers lost their leadership posts in the Legislature. After an appeal was filed to this Court on behalf of Karcher and Orechio, ostensibly in their leadership capacities, their successors informed the Court that they would not defend the statute and were withdrawing the Legislature's appeal. The new legislative leaders also moved to dismiss the appeal on the ground that the Legislature's withdrawal left the Court without a case or controversy. Karcher, however, sought to continue his appeal despite the change in legislative leadership. Thus, *Karcher* presented the question "whether public officials who have participated in a lawsuit solely in their official capacities may appeal an adverse judgment after they have left office." *Karcher*, 484 U.S. at 74.

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quently has been applied to cases mooted by settlements." Pet. at 8.

This Court ruled in the negative, finding that the proper party "at each point in the proceedings below was the incumbent legislature." *Id.* at 81. After losing their leadership roles in the Legislature, Karcher and Orechio lacked authority to pursue their appeal on behalf of the Legislature. *Id.* As merely individual legislators, Karcher and Orechio were "not 'parties' entitled to appeal the Court of Appeals' judgment under 28 U.S.C. § 1254(2)." *Id.* Thus, this Court dismissed their appeal for want of jurisdiction. *Id.*

Karcher and Orechio then argued that if their appeal must be dismissed, the judgment below must be vacated under *Munsingwear*. They argued that "the rationale underlying the *Munsingwear* procedure applies to this case, for it is the happenstance of their loss of official status that renders the judgment unreviewable." *Id.* at 82.

This Court rejected that argument "because its underlying premise is wrong." *Id.* at 83. The Court explained:

> This case *did not become unreviewable* when Karcher and Orechio left office. Rather, under Federal Rule of Appellate Procedure 43(c)(1), the authority of Karcher and Orechio to pursue the appeal on behalf of the legislature passed to their successors in office. The rules effectuating automatic substitution of public officers were specifically designed to *prevent suits* involving public officers *from becoming moot* due to personnel changes. *Id.* (Emphasis added).

Therefore, the controversy in *Karcher* "*did not become moot* due to circumstances unattributable to any

of the parties." *Id.* (emphasis added). Rather, "[t]he controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case." *Id.*

The *Karcher* Court, then, refused to apply *Munsingwear* not because the action became moot due to the actions of one of the parties, but rather because the case was *not moot* at all. As the Court recognized, Federal Rule of Appellate Procedure 43(c)(1) *prevented* the case from becoming moot upon the change in legislative leadership. Rather than becoming moot, the controversy *ended* when the losing party "declined to pursue its appeal." In short, the controversy had not become "unreviewable due to mootness"; thus, *Munsingwear* was not invoked.

Karcher has no relevance to this case, for Petitioner does not dispute in its Petition that this case was rendered *moot* by the settlement between VCA and Venice Hospital. In addition, unlike the New Jersey Legislature in *Karcher*, VCA never withdrew its appeal of the District Court's judgment. Quite to the contrary, VCA vigorously and consistently challenged the District Court's judgment. VCA, moreover, successfully persuaded all three members of an Eleventh Circuit panel that the District Court's judgment lacked any merit as a matter of fact or law. VCA later sought to sustain the Eleventh Circuit panel decision in its settlement with Venice Hospital, by jointly moving with Venice Hospital to have a judgment entered in favor of VCA in accordance with the Eleventh Circuit panel decision. Finally, VCA urged the entire Eleventh Circuit, after it decided to rehear the case en banc, to reinstate the panel decision in its entirety.

Unlike the facts in *Karcher*, then, this case involves no change in position by the appellant as to the meritorious nature of its appeal. *Karcher* must be limited to its facts. *Karcher* did not carve out an exception to the *Munsingwear* doctrine.

2. The Eleventh Circuit's Opinion Does Not Conflict With Other Circuits' Rulings On Motions To Vacate.

The Eleventh Circuit acted in accordance with *Munsingwear* when it vacated the District Court judgment based on the settlement between VCA and Venice Hospital. In addition, the Eleventh Circuit's ruling does not conflict with rulings in similar cases by other Circuit Courts of Appeals. Petitioner creates an artificial conflict among the Circuits by comparing the Eleventh Circuit's routine application of the vacatur doctrine in this case to decisions rendered by other Circuits on *motions to vacate*, where vacatur was sought by settling parties as an essential term of their settlement.

The fact that there is no conflict created by the Eleventh Circuit's ruling herein is perhaps best demonstrated by contrasting the issue in this case with that presented to this Court in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 507 U.S. ___, 122 L. Ed. 2d 649, 113 S. Ct. 1249, *cert. dismissed as improvidently granted*, 510 U.S. ___, 126 L. Ed. 2d 396, 114 S. Ct. 425 (1993).

In *Izumi*, the single question presented for this Court's review was: "Should the United States Courts of Appeals routinely vacate district court final judgments *at the parties' request* when cases are settled

while on appeal?" *Izumi*, 126 L. Ed. 2d at 401 (emphasis added). By contrast, the question presented by Petitioner herein does not challenge vacatur in the context of motions to vacate, because here there was no request by either of the settling parties to vacate the District Court judgment. Not only did none of the parties request vacatur, but, as the Petitioner emphasizes in its presented question, it "objected to vacatur" by the Eleventh Circuit. This case, then, does not involve the arguable propriety of parties *requesting* the vacation of a district court judgment in order to effectuate a settlement reached by the parties, as in *Izumi*, but rather an objection to the *routine application* of *Munsingwear* vacatur to cases that have become moot on appeal.[10]

Like *Izumi*, the cases relied upon by Petitioner in its Petition raise issues in procedurally different contexts than that in this case. For instance, in *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988), the Seventh Circuit denied the parties' motion to vacate the district court judgment, in part because the settlement in that case did *not* make the case moot. *Id.* at 1301. Noting that the settlement required the lower court's approval, the Seventh Circuit held that if such approval were declined, "the dispute is as live as ever." *Id.* In fact, the district court judgment in that case was not "unreviewable

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[10] Petitioner argues that "the instant case presents a useful and appropriate vehicle for the Court to enunciate a consistent national rule delineating the extent to which vacatur should be ordered when a case becomes moot while on appeal." Pet. at 3. This Court, however, has *already* articulated a clear and "consistent national rule" of vacatur, in *Munsingwear* and its progeny.

because of mootness" under *Munsingwear*: "The Department and its fiscal intermediary were not disabled from obtaining review; they have simply chosen, for reasons they deem sufficient, to forego the entitlement they possess." *Id.* Therefore, *Memorial Hospital* closely resembles this Court's ruling in *Karcher*, *supra*, in that neither case was moot for purposes of *Munsingwear*. Here, by contrast, Petitioner does not dispute in its Petition that this case was rendered moot by the settlement between VCA and Venice Hospital.

In explaining the policy reasons behind denying parties' motions to vacate, moreover, the Seventh Circuit in *Memorial Hospital* demonstrates the critical distinction between motions to vacate, brought as part of settlements, and routine vacatur under *Munsingwear*. Specifically, the Seventh Circuit objected to private agreements that seek to "annul" or "expunge" the district court's acts, in an effort by the parties to "rewrite" history. *Memorial Hospital*, 862 F.2d at 1300. As the Seventh Circuit explained, "it may be inappropriate to approve a settlement that squanders judicial time that has already been invested." *Id.* at 1302. "When a clash between genuine adversaries produces a precedent, . . . the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement." *Id.* A court opinion, moreover, "may have great value to strangers--a value that one or another party to today's case may try to appropriate in the settlement, but which is not theirs to sell." *Id.*[11]

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[11] Similarly, in another case relied upon by Petitioner, *Man-*

Unlike the situation in *Memorial Hospital* and other cases involving motions to vacate, the settlement between VCA and Venice Hospital did not seek to "squander judicial time that has already been invested." Rather, the parties' settlement sought to maximize the value of the judicial time spent in this case by sustaining the well-reasoned panel decision of the Eleventh Circuit. The parties' settlement acknowledged and furthered the great social value inherent in the Eleventh Circuit's precedent. In short, VCA's settlement with Venice Hospital endeavored to *preserve* a precedent, not to expunge or *vacate* one.

It is the Petitioner who wants to have its cake and eat it too. The Eleventh Circuit admitted that it "improvidently" decided to rehear this case en banc. Therefore, the Eleventh Circuit returned the case "to the status it occupied when VCA and Venice Hospital informed the court that the controversy had been settled"—after the panel decision reinstating the jury verdict, but before a ruling on the Petition for Rehearing. Pet. App. 8a. In dismissing the appeal due

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ufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381 (2d Cir. 1993), the Second Circuit held that once a decision that is not reviewable as of right has been rendered, "we decline to allow [the parties] to dictate, by purchase and sale, whether the precedent it sets will remain in existence." *Id.* at 385. Aside from the other reasons stated above, Petitioner's reliance on *Manufacturers Hanover* is misplaced, for the Second Circuit's "refusal to vacate is limited to judgments as to which there is no right of review." *Id.* Thus, in *Manufacturers Hanover*, the Second Circuit refused to vacate *its* prior decision, as opposed to the district court's judgment. If anything, *Manufacturers Hanover* supports continued viability of the panel decision of the Eleventh Circuit in this case, not the District Court judgment that it reversed.

to the settlement, the Eleventh Circuit could hardly revive the totally discredited District Court judgment that was reversed by the unanimous panel. After all, if left standing, the District Court opinion would have perplexed courts for years to come. Courts would have been left struggling for ways to distinguish their cases from a decision that is devoid of merit under well-settled antitrust jurisprudence.[12] The judicial resources "squandered" by such a result would have been tremendous. Thus, if the Eleventh Circuit erred at all, it erred by not issuing a judgment and mandate in accordance with the panel opinion. However, Petitioner cannot have it both ways: If the appeal must be dismissed, so must the District Court judgment be vacated.

IV. CONCLUSION

The Eleventh Circuit followed the longstanding *Munsingwear* rule in vacating the District Court judgment due to the mootness resulting from the settlement between VCA and Venice Hospital. Further, the Eleventh Circuit's action does not conflict with rulings in similar cases by other Circuit Courts of Appeals. The Eleventh Circuit's routine application of *Munsingwear* does not conflict with other Circuits' denials of settling parties' requests to vacate judicial precedents.

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[12] Petitioner's puzzling reference to the District Court judgment as "a judicial precedent that was created with substantial public economic and implied moral investment," Pet. at 13, is belied by the 19-page, unanimous panel decision that systematically refuted the District Court judgment under antitrust principles that have long been articulated and applied by this Court.

For these reasons, Respondent VCA respectfully submits that the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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